IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 416

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN, FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and HELEN D. BUTTENWIESER,

Appellants,

against

JOHN W. GARDNER, as Secretary of the Department of Health, Education and Welfare of the United States and HAROLD HOWE, 2d, as Commissioner of Education of the United States,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF OF ROSE SPIRA, NOCHUM GOLDBERG, MOSHE HUTCHINSON, FAY BIENSTOCK, EVELYN FARKASH, EILEEN KELLEHER, VIOLA GRAVES, ISOLINA PEREZ, JOSEPH McDERMOTT, HAZELTINE LEWIS, JOSE MARTINEZ, MAJOR EDWARDS, VIVIAN KOKAKIS, THEOPHANIS GINIS, and BERTHA ZAHARAKOS, *AMICI CURIAE* IN SUPPORT OF APPELLEES.

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Pursuant to Rule 42 of the Rules of this Court, Rose Spira, Nochum Goldberg, Moshe Hutchinson, Fay Bienstock, Evelyn Farkash, Eileen Kelleher, Viola Graves, Isolina Perez, Joseph McDermott, Hazeltine Lewis, Jose Martinez, Major Edwards, Vivian Kokakis,

Theophanis Ginis, and Bertha Zaharakos, by their attorneys, Herbert Brownell and Thomas F. Daly, respectfully move this Court for leave to file the annexed brief as *amici curiae* in support of appellees herein. Appellees have consented to the filing of this brief. Although appellants gave their consent, they have stated it was conditioned on the *amicus* brief being submitted by December 30, 1967, which is thirty days prior to the time which has been allowed for the filing of appellees' brief.

The movants are parents and guardians of children who receive educational help under Title I of the Elementary and Secondary Education Act of 1965 (hereinafter "the Act") in programs which it is the purpose of appellants' lawsuit to have declared unconstitutional. The Act makes such aid available to all children who live in areas where low-income families are concentrated, whether the children are regularly enrolled in public or nonpublic schools, under programs of local public school boards. Under the Act, the local public school board determines where the programs it administers shall be conducted. The public school board in New York City has said that the children's educational needs require that it conduct programs of speech therapy, remedial reading, remedial arithmetic, and guidance counselling in the children's regular school environment.[1] There are also other Title I programs in which children regularly enrolled in religiously affiliated schools take part which the public school board in New York City conducts on the premises of public

[1] Affidavit of Herbert Brownell sworn to May 17, 1967, paragraph 2, which has been made part of the record on this appeal at the request of the Solicitor General.

school buildings. It is only the remedial programs for retarded children conducted on the premises of religiously affiliated schools which are challenged in this lawsuit, and these are the programs under which the children of the parents who ask leave to file the appended brief are benefited.

These children and others who also receive educational help on the premises of religiously affiliated schools are the only persons who will be directly affected by the outcome of this lawsuit. If appellants succeed, these children will be singled out, because they regularly attend schools having some religious affiliation, and deprived of the help Congress has made available to all children in poverty areas who need it. In order to receive the help in speech therapy, remedial reading, remedial arithmetic, and guidance counselling in the manner in which the public school board has determined the educational needs of the children require, these children would, on appellants' view of the Constitution, have to give up their enrollment in schools having a religious affiliation and become regularly enrolled in public schools or in private schools not having a religious affiliation.

The parents of these children do not believe that, where Congress has enacted public welfare legislation for all children without regard to their religious association, some children may be excluded by reason of their religious beliefs or affiliations. They believe that their rights under the First Amendment protect them and their children from being disqualified from receiving benefits under the Act because of their religious practices and associations. These parents also believe

that our constitutional law should not be changed to allow any person or group who does not have a direct interest in the matter to bring lawsuits seeking to deprive certain citizens, solely because of their religious beliefs and affiliations, of the benefits of our nation's general welfare programs. These rights are personal to them and therefore cannot be represented by the appellees.

These parents are vitally affected by the resolution of the question of standing to sue presented on this appeal. If the law is changed to allow any member of the public to bring into question before the courts the rights of certain other persons, solely because those persons have a religious association, to receive general welfare benefits which Congress has made available to all persons, these parents and their children, and other persons having religious associations, will be set apart from the rest of society as the only persons whose right to general welfare benefits may be so challenged.

For the reasons heretofore assigned, and upon the proposed *amicus* brief annexed hereto, it is respectfully requested that this motion for leave to file this brief be granted.

Dated, New York, New York
January 29, 1968

Respectfully submitted,

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Interest of the *Amici Curiae*

The *amici curiae* submitting this brief are parents and guardians of children who receive special educational help under Title I of the Elementary and Secondary Education Act of 1965 (hereinafter "the Act"), which makes such help available to all children who live in areas having high concentrations of low-income families. The children of the *amici curiae* are regularly enrolled in schools in New York City affiliated with the Jewish, Lutheran, Roman Catholic, and Greek Orthodox faiths. They receive special educational help in public-school programs conducted under the Act on the premises of their own schools as a result of a determination of their local public school board that the children's educational needs require that programs of speech therapy, remedial reading, remedial arithmetic, and guidance counselling, be conducted in the regular educational environment of the disadvantaged children.

The *amici curiae* oppose any change in the law of standing to sue which would permit persons who are not directly affected to bring lawsuits to deny certain persons, because of their religious associations and practices, the benefits of laws enacted by Congress for the general welfare. These parents are vitally affected by the resolution of the question of standing to sue presented on this appeal. If the law is changed to allow any member of the public to bring into question before the courts the rights of certain other persons, solely because those persons have a religious association, to receive general welfare benefits which Congress has made available to all persons, these parents and their children, and other persons having religious as-

sociations, will be set apart from the rest of society as the only persons whose right to general welfare benefits may be so challenged.

Statement of the Case

The complaint alleges that the appellees, who are the Secretary of Health, Education and Welfare and the Commissioner of Education of the United States, are causing appellants' rights under the free exercise and establishment clauses of the First Amendment to the Constitution to be violated by approving programs under the Act. Appellants claim that the appellees' approval of the programs to which they object constitutes compulsory taxation for religious purposes in violation of the free exercise clause and effects a contribution of tax-raised funds to the support of religious institutions in violation of the establishment clause.

The allegations of the complaint omit to state that funds available under the Act may not be used for religious worship or instruction (§ 605); that the purpose of the educational services provisions of the Act is to provide funds to add to the educational services available to all children in poverty areas in which, the Congress has found, children have special educational needs and there is a lack of local funds to provide adequate educational programs (Title I § 201); that the only recipients of funds under the Act are local public school boards (Title I §§ 202, 203, 205, 207; Title II §§ 202, 204); that the only programs for children attending nonpublic schools which may be supported by Title I funds are programs not already offered by the local schools which "contribute par-

ticularly to meeting the special educational needs of educationally deprived children" (§ 201); that it is an educational decision of the local public school board whether any particular program is conducted in the school the children regularly attend or at some other location and that the programs of the Board of Education of the City of New York which are given to non-public school children on the premises of their own schools are programs for children who are troubled in that they need speech therapy, remedial reading, remedial arithmetic, and guidance counselling (§ 205(a)(1), (2), affidavit of Herbert Brownell sworn to May 17, 1967, par.2);[1] that it is the public school board which hires teachers, establishes curricula, and makes every decision in implementing the programs, including the decision where any particular program of instruction is to take place (§ 205(a)(2); affidavit of Herbert Brownell sworn to May 17, 1967, par.2); and, with respect to Title II, that materials may be purchased only by a public school board and children and teachers are allowed only the use of the materials, which must be accounted for to the public school board (§ 205).

The complaint does not contain allegations at odds with any of these omitted facts; it is silent with respect to who receives federal funds, who is hired to do the teaching, the purpose of the Act, the nature of the programs for which federal funds may be used, the nature of the particular programs of the Board of Education of the City of New York referred to in the complaint,

[1] This affidavit is one of the affidavits which have been made part of the record herein at the request of the Solicitor General and were transmitted to the Clerk of this Court by the Clerk of the United States District Court for the Southern District of New York on November 27, 1967.

and who determines the location where any particular educational program is to be given. The only factual allegations of the complaint upon which appellants base their claim that their First Amendment rights have been contravened are allegations that instruction under Title I is provided and library materials under Title II are used "in sectarian or religious schools."

There is no allegation that any funds are being used, even indirectly, to support religious worship or instruction. Indeed, section 605 of the Act which prohibits any payment for those purposes is not even referred to by appellants or listed in the appendix to their brief as a relevant provision of the Act.

Appellants' complaint with respect to Title I is simply that certain educational services are provided as part of a public program to help all children in poverty areas on the premises of the schools in which the children are regularly enrolled, which in some instances are schools having religious affiliations, because the local public school board has decided for educational reasons that those particular programs should be conducted there. Similarly, with respect to Title II appellants' complaint is that some books and library materials are used on the premises of such schools.

Appellants are described in the complaint as citizens of the United States and of the State of New York who are federal taxpayers and qualified voters of the United States as well as residents and voters of the State of New York. One appellant is also described as a real property taxpayer in the State of New York, and another appellant is described as having children

regularly registered in and attending the elementary or secondary grades in the public schools of New York.

The complaint contains no allegations that the appellants have any religious or atheistic beliefs or that any child of the appellant described as a parent is eligible to receive any benefits under the Act or is in any way affected by the acts complained of. The only religious beliefs or associations involved in the case not those of the appellants but those of the particular persons the appellants seek to have declared ineligible to receive help.

The purpose of the Act is set forth in the Report of the Senate Committee on Labor and Public Welfare, S. Rep. No. 146, 89th Cong., 1st Sess. 4-5 (1965), as follows:

> The purpose of this legislation is to meet a national problem. This national problem is reflected in draft rejection rates because of basic educational deficiencies. It is evidenced by the employment and manpower retraining problems aggravated by the fact that there are over 8 million adults who have completed less than 5 years of school. It is seen in the 20-percent unemployment rate of our 18- to 24-year-olds. It is voiced by our institutions of higher learning and our vocational and technical educators who have the task of building on elementary and secondary education foundations which are of varying quality and adequacy.

The Act itself provides in § 201, Title I:

DECLARATION OF POLICY

SEC. 201. In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in this title) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children.

Financial assistance of various kinds is provided for in the several Titles of the Act. This suit challenges Title I, under which financial assistance is provided to "local educational agencies", which are defined in § 601(f) of the Act as local public school boards or their equivalents, for the education of children of low-income families, and Title II, under which library resources, textbooks, and certain other instructional materials are provided to a state or to a local public school board for loan to children and teachers.

Title I provides in Section 205(a)(2) that in order to qualify for Title I funds, a local public school board must determine:

(2) that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who

> are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate; . . .

"Dual enrollment" refers to the attendance of certain pupils at more than one school, and with respect to Title I it refers to sending children from the school in which they are regularly enrolled to a different school to receive certain educational services. "Mobile educational services and equipment" refers to the conduct of the public school boards' Title I programs under public school board administration and control on the premises of the school in which the children are regularly enrolled.

In no program under the Act is any money provided to any nonpublic school, educator, parent, or pupil. All Title I programs are programs of the public school board, administered by public school authorities. It is the local public school board which determines where any particular educational program takes place. It is the public school board which decides whether children who are regularly enrolled in nonpublic schools receive particular instruction at the school they regularly attend or at some other location. With respect to programs conducted by the Board of Education of the City of New York, to which appellants refer in paragraphs 10 and 11 of their complaint, it is not and cannot be disputed that it is the Board of Education of the City of New York which has decided that certain

programs of remedial instruction under Title I should be given at the schools the children regularly attend and that the Board's decision was based on the Board's determination that instruction at those locations is educationally more valuable than the same programs conducted elsewhere would be. Other Title I programs in which children regularly enrolled in nonpublic schools participate take place in public buildings.

The programs which the Board has decided should be conducted in the children's regular school environment are programs for children who are retarded in that they need speech therapy, remedial reading, remedial mathematics, and certain guidance counselling. In a "Statement by the Board of Education on Title I Proposals" of August 31, 1966, the Board said (affidavit of Herbert Brownell sworn to May 17, 1967, par. 2):[1]

> There can be no dispute that, if all the Title I programs were to be open to non-public school students during after-school hours only, these students would not be reached as well as their needs require. The Board's own experience in giving instruction of this character has demonstrated that the after-school centers are not as well attended as they should be by the students who need the most help. Moreover, the Board has learned by experience that remedial instruction by teachers specially assigned for the purpose should, to be as effective as possible, be carried on in fre-

[1] This affidavit is one of the affidavits which have been made part of the record herein at the request of the Solicitor General and were transmitted to the Clerk of this Court by the Clerk of the United States District Court for the Southern District of New York on November 27, 1967.

quent consultation with the regular class-room teachers of the children in question. Frequently, also, the children's records need to be looked at. All this would be difficult to manage in after-school centers, particularly when conducted on school premises other than the children's regular schools.

In addition to attacking the Act for allowing a local public school board to make such a determination with respect to Title I programs, appellants also challenge the use of books and library materials, by anyone, on the premises of religiously affiliated schools. Title II grants are made to states which submit to the Commissioner of Education a plan, as required in Section 203(a) of the Act, that:

> (2) sets forth a program under which funds paid to the State from its allotment under section 202 will be expended solely for (A) acquisition of library resources (which for the purposes of this title means books, periodicals, documents, audio-visual materials, and other related library materials), textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools in the State, and (B) administration of the State plan, including the development and revision of standards relating to library resources, textbooks, and other printed and published instructional materials furnished for the use of children and teachers in the public elementary and secondary schools of the State, except that the amount used for administration of the State plan shall not exceed for the fiscal year ending June 30, 1966, an amount equal to 5 per centum of the amount paid to the State under this title for that

year, and for any fiscal year thereafter an amount equal to 3 per centum of the amount paid to the State under this title for that year;

(3) sets forth the criteria to be used in allocating library resources, textbooks, and other printed and published instructional materials provided under this title among the children and teachers of the State, which criteria shall—

(A) take into consideration the relative need of the children and teachers of the State for such library resources, textbooks, or other instructional materials, and

(B) provide assurance that to the extent consistent with law such library resources, textbooks, and other instructional materials will be provided on an equitable basis for the use of children and teachers in private elementary and secondary schools in the State which comply with the compulsory attendance laws of the State or are otherwise recognized by it through some procedure customarily used in the State; . . .

Title II of the Act makes clear in Section 203(a)(5) that the materials available under that Title are limited to materials which will add to the educational resources of a particular locality and may not be used to supplant the materials made available at the state or local levels by public or private funds. Title II materials are selected solely by public-school authorities. They are purchased solely by public-school authorities, and Title II programs are administered solely by public-school authorities.

In this respect, Title II serves a completely different function from that of certain state statutes which

authorize the provision of textbooks to all children enrolled in public or private schools and are designed to provide the normally required textbooks to children enrolled in nonpublic as well as public schools. It is the purpose of Title II of the federal Act to enrich and add to the library and textbook resources locally available without supplanting any public or private responsibility with respect to the furnishing of the textbook materials normally required.

Title II also requires in Section 205 that title to the library resources, textbooks, and other materials shall vest only in a public agency and that the Title II materials shall be limited to those which have been approved by the state or local public agency for use in the public elementary schools of the state.

In neither Title I nor Title II is there any basis for sorting out children for different treatment on the basis of their religion.

Summary of Argument

There is no merit to appellants' contention that this case should be distinguished from *Frothingham* v. *Mellon*, 262 U. S. 447 (1923). In Point I below it is shown that, despite appellants' contention to the contrary, the Court's decision in that case rested squarely on the limitation of the Court's jurisdiction of Article III of the Constitution. Moreover, appellants' complaint sets forth no adverseness, which the Court has found indispensable to a determination of a constitutional question by this Court, as is demonstrated by the fact that they

fail to allege anything which would show any relation between the ruling they seek and any effect upon them of the acts of which they complain. It is no answer to the lack of adverseness for appellants to argue that the expense of litigation will deter frivolous claims; there are organizations which exist and receive ample financial support to foster particular ideas of how our society should be ordered. Furthermore, the authorities appellants rely upon to support their contentions that a federal taxpayer has standing to sue will not support them. The cases are all either examples of suits commenced by local taxpayers, whose interest in local expenditures was contrasted to the interest of the federal taxpayer in the federal treasury by this Court in *Frothingham* v. *Mellon,* or of suits by persons who are affected in a way quite different from having to pay the federal income tax. The commentators appellants rely on make clear that to have standing a plaintiff should be required to have an interest of his own in which he suffers a palpable injury. Appellants' attempt to discredit the decision in *Frothingham* v. *Mellon* by arguing that the Court ruled in that case that some violations of the Constitution are *de minimis* is, of course, a misreading of the case. The decision was not based on the proposition that there are violations of constitutional rights which are too small to be redressed. The decision in that case is that the interest of a taxpayer in the general funds of the federal treasury is too indefinite and remote to provide a basis for a claim that a taxpayer suffers legal injury because of an expenditure.

There is no factual basis for appellants' contention that there can be no suit to challenge the Act unless

federal taxpayers have standing to sue. As is shown in Point II below, there are not only state and local educational organizations which have greater claim to standing than the federal taxpayer, but also there are individuals who are directly affected by the operation of the Act.

Standing to sue under the religious freedom clauses of the First Amendment should never be allowed to federal taxpayers or members of the general public where the claim of constitutional invalidity is based upon the proposition that Congress in benefiting all members of the public generally has violated the proscriptions of the First Amendment because some members of the public have religious associations. The case where a benefit to religion depends upon the plaintiff's contention that some members of the public should be treated differently from other members of the public because of their religious affiliation is fundamentally different from a case in which an act of Congress by its terms bestows a benefit on religious institutions or treats persons having a religious affiliation differently from the general public. As is more fully set forth in Point III below, the First Amendment should protect members of society from being pointed out in lawsuits as associated with religious institutions by those who would seek to forestall their receipt of national public welfare benefits, solely because of their religious association, which Congress has made available to all members of society.

Furthermore, a federal taxpayer should not be allowed standing to sue without consideration of the

nature of the asserted constitutional violation and the relation of the plaintiff to it, for otherwise, as is shown in Point IV below, the constitutional questions presented to the Court will be framed to promote the legislative ideas of various persons and groups of how our society should be structured and will bear no relation to any injury to anyone.

I

Under all the Authorities, Appellants Lack Standing to Sue.

A. The Decision in *Frothingham* v. *Mellon* is Based Squarely upon the Limitation of Jurisdiction of Article III of the Constitution

Appellants contend that the only possible obstacle to their suit is the decision in *Frothingham* v. *Mellon,* 262 U.S. 447 (1923), and that that decision is not an obstacle because it does not state a Constitutional limitation and, that being so, this Court should not apply it to claims of First Amendment violations. Appellants contend that the doctrine of standing is a doctrine of self-restraint which is not based on the Constitutional limitation on the Court's jurisdiction.

While the Court has used the word "standing" in refraining from exercising its jurisdiction, it has also used the term in many decisions holding that it lacks jurisdiction because there is no case or controversy. As stated in *Barrows* v. *Jackson,* 346 U.S. 249 (1953), at 255:

> The requirement of standing is often used to describe the constitutional limitation on the

> jurisdiction of this Court to "cases" and "controversies." See *Coleman* v. *Miller*, 307 U. S. 433, 464 (concurring opinion). Apart from the jurisdictional requirement, this Court has developed a complementary rule of self-restraint for its own governance (not always clearly distinguished from the constitutional limitation) which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others.

In the instant case, as in *Frothingham* v. *Mellon*, *supra*, the taxpayers lack standing in the jurisdictional sense in that they are parties to no case or controversy, of which a direct personal interest in the outcome is a necessary ingredient. In *Baker* v. *Carr*, 369 U.S. 186, 204 (1962), the Court stated the nature of this direct interest as follows:

> A federal court cannot "pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." *Liverpool Steamship Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39. Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing. It is, of course, a question of federal law.

In *Frothingham* v. *Mellon*, 262 U.S. 447 (1923), this Court passed for the first time upon "the right of

a taxpayer to enjoin the execution of a federal appropriation act, on the ground that it is invalid, and will result in taxation for illegal purposes . . ." 262 U.S. at 486. This Court held in a unanimous decision that the plaintiff alleged no direct injury and for that reason that the Court lacked jurisdiction. This decision is not that anyone's Constitutional rights are too small to be redressed, as is suggested throughout appellants' brief, but that the nature of a federal taxpayer's interest in the general funds of the federal treasury, partly realized from taxation and partly from other sources, is too indirect to support a claim that a federal taxpayer is directly affected at all by reason of an expenditure from the federal treasury. The Court stated at page 487 of its opinion "[T]he effect upon future taxation, of any payment out of the funds, [is] so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." The decision rests squarely on the Constitutional limitation, and the Court said plainly, in the portion of the opinion which appellants contend does not rest on jurisdictional grounds, at pages 488-489:

> We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which

> otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess.

The *Frothingham* decision has been understood by the lower federal courts to be based on the constitutional limitations on the Court's jurisdiction. *E.g., Reynolds* v. *Wade,* 249 F.2d 73 (9th Cir. 1957); *Buscaglia* v. *District Court of San Juan,* 145 F.2d 274 (1st Cir. 1944), cert. denied, 323 U.S. 793 (1945).

The Court has never intimated that the decision does not apply to challenges based upon the freedom-of-religion clauses of the First Amendment. On the contrary, in *Doremus* v. *Board of Education,* 342 U.S. 429 (1952), in which a state taxpayer challenged Bible-reading in a public school as a violation of the estab-

lishment clause of the First Amendment, the Court reiterated the rule, stating at page 433 that it had held "that the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect," and stating at page 434:[1]

> [W]e reiterate what the Court said of a federal statute as equally true when a state Act is assailed: "The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Massachusetts* v. *Mellon, supra,* at 488.

The reason for the Court's holding was stated as follows at pages 434-435:

> [B]ecause our own jurisdiction is cast in terms of "case or controversy," we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.
>
> The taxpayer's action can meet this test, but only when it is a good-faith pocketbook action. It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference. If appellants established the requisite special injury necessary to a taxpayer's case or controversy, it would not

[1] See also *Elliott* v. *White,* 23 F.2d 997 (D.C. Cir. 1928), in which the Court of Appeals of the District of Columbia held that under the *Frothingham* decision a taxpayer or citizen could not maintain a suit to enjoin the payment of salaries to chaplains of the Army and Navy as an establishment of religion.

matter that their dominant inducement to action was more religious than mercenary. It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be injured by the unconstitutional conduct. We find no such direct and particular financial interest here. If the Act may give rise to a legal case or controversy on some behalf, the appellants cannot obtain a decision from this Court by a feigned issue of taxation.

B. Appellants' Claim Sets Forth No Direct Injury and No Adversary Contest

The court has developed the rule that it will not decide Constitutional questions at the instance of one who is not "himself immediately harmed or immediately threatened with harm, by the challenged action", or where there is "a want of a truly adversary contest." *Poe* v. *Ullman,* 367 U.S. 497, 504, 505 (1961) (opinion of Justice Frankfurter).

Here there is, of course, no direct injury and no truly adversary contest, as is demonstrated by the fact that these appellants, who here seek to prevent federal educational aid programs from taking place on the premises of religiously affiliated schools, say they would allow the same help to be given to the same persons in a different location and that health, dental, and lunch aid may be given at any location. But while in the instant case they say that they have no objection to the latter, they are of course free to do a complete about-face and claim that such aid may be given only on the premises of nonpublic schools, and that public buildings may not be used for such purposes. Appel-

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lants may make any or all of these claims because there is no relation between any of them and any effect on the appellants. The provisions of the Act allowing public school boards to determine whether a particular program shall be conducted by "dual enrollment" or by "mobile educational services" are presented by the complaint in this lawsuit in such a way that adjudication upon their validity would take place in the most abstract kind of setting.

In *Chicago & Grand Trunk R. Co.* v. *Wellman*, 143 U.S. 339 (1892), the parties stipulated all the facts which, if disputed, might have served as the basis of a decision which did not require a determination of the Constitutional validity of a statute, prompting this Court to announce at pages 344-345 the following rule requiring adverseness:

> The theory upon which, apparently, this suit was brought is that parties have an appeal from the legislature to the courts; and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest

> and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.

More recently the Court has said that the actual antagonistic assertion of rights to be adjudicated is "a safeguard essential to the integrity of the judicial process", and one which the Court has held to be "indispensable to adjudication of constitutional questions by this Court." *United States* v. *Johnson,* 319 U.S. 302, 305 (1943).

In the instant case, appellants are attempting to procure a determination that it is unconstitutional to conduct public educational programs or use public educational library materials on the grounds or in the buildings of religiously affiliated schools. Programs under Title I and Title II of the Act are the vehicles for appellants' attempt to procure the constitutional ruling they desire, and appellants have avoided setting forth any allegation which would show the nature of programs under the Act. They have omitted to set forth any factual allegations showing the purpose or administration of the Act or who receives funds made available by it or how the challenged conduct in any way impinges on their rights. It is difficult to imagine a complaint which better demonstrates the wisdom of the Court's policy of deciding only issues raised by the "actual antagonistic assertion of rights by one individual against another" as stated in *Chicago & Grand Trunk R. Co.* v. *Wellman, supra,* at 345.

Being unable to show any real adverseness, appellants advance the contention, as a reason why this court should take jurisdiction, that the case must have merit because the expense of litigation would deter the making of a frivolous claim. Apart from the startling suggestion that adverseness may be judged by such a standard, the contention is disingenuous, for there are many organizations which depend on, and are given, large sums in order to further the donors' particular ideas of how our society should operate.

C. Appellants' Authorities Will Not Support Their Contentions

Apart from contending that the *Frothingham* decision is not based upon the Constitution's jurisdictional limitations, appellants attempt to avoid the decision in *Frothingham* v. *Mellon* in several other ways. They refer to several decisions of this Court, both earlier and later than the *Frothingham* decision, as examples of cases in which, according to appellants, suits such as *Frothingham* were decided on the merits. Appellants' authorities will, however, not support their contention. In *Millard* v. *Roberts,* 202 U.S. 429 (1906), the Court treated the plaintiff as a taxpayer of the District of Columbia as it did in *Bradfield* v. *Roberts,* 175 U.S. 291 (1899), a case expressly distinguished in the *Frothingham* decision at page 486 as follows:

> The case last cited [Bradfield v. Roberts] came here from the Court of Appeals of the District of Columbia, and that court sustained the right of the plaintiff to sue by treating the case as one directed against the District of Columbia, and therefore

> subject to the rule frequently stated by this Court, that resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation. *Roberts* v. *Bradfield*, 12 App. D. C. 453, 459-460. . . .

Similarly, *Heim* v. *McCall*, 239 U.S. 175 (1915); *Hawke* v. *Smith*, 253 U.S. 221 (1920); and *Coyle* v. *Smith*, 221 U.S. 559 (1911); are actions challenging state expenditures and do not concern the nature of an individual's interest in expenditures from the federal treasury. And in *Wilson* v. *Shaw*, 204 U.S. 24 (1907), a suit by a taxpayer and citizen to enjoin the construction of the Panama Canal, the Court rested its affirmance of a dismissal of a demurrer to the bill in equity on "the general scope of the bill," stating, at page 31:

> That generally speaking, a citizen may be protected against wrongful acts of the Government affecting him or his property may be conceded. That his remedy is by injunction does not follow. A suit for an injunction is an equitable proceeding, and the interests of the defendant are to be considered as well as those of the plaintiff. Ordinarily it will not be granted when there is adequate protection at law. In the case at bar it is clear not only that plaintiff is not entitled to an injunction, but also that he presents no ground for any relief.

The Court then went on to show that there was no basis for the plaintiff's claim, but the fact that it did so does not show that it ever considered that it had jurisdiction. In fact, the Court expressly warned at page 31:

> Is it any more than an appeal to the courts for the exercise of governmental powers which belong

exclusively to Congress? We do not stop to consider these or kindred objections; yet, passing them in silence must not be taken as even an implied ruling against their sufficiency.

Nor do any of the cases cited at page 23 of appellants' brief have anything to do with a taxpayer's interest in disbursements from the federal treasury. *Cochran* v. *Louisiana Board of Education*, 281 U. S. 370 (1930), concerned a state expenditure. *Everson* v. *Board of Education* 330 U. S. 1 (1947), concerned a local expenditure authorized by a state statute, and *Adler* v. *Board of Education*, 342 U. S. 485 (1952), concerned a city taxpayer. *Wieman* v. *Updegraff*, 344 U. S. 183 (1952), concerned a state loyalty oath, and the appellants who invoked the jurisdiction of this Court were state employees to whom the courts of Oklahoma had forbidden the State to pay salaries in a suit originally commenced by state taxpayers. *Harper* v. *Virginia State Board of Elections,* 383 U. S. 663 (1966), concerned the right of a citizen of a state to vote without having to pay a poll tax. *Engel* v. *Vitale,* 370 U.S. 421 (1962), was a suit by parents of children whom a state caused to say a daily prayer, while *Baker* v. *Carr,* 369 U.S. 186 (1962), concerned the right of certain voters to have their votes given as much effect as the votes of others.

Nor will the writers referred to at page 31 of appellants' brief provide appellants substantial support. One of them, Professor Davis, in discussing the articles written by Professor Jaffe to which appellants refer, states at page 57 of the 1965 Pocket Part to 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 22.10, that the Jaffe articles are "vulnerable in their version of what

the law is." In discussing the rule of *Frothingham*, Davis states, *id* at page 64:

> But the "tradition" and the "practice" in the Supreme Court are clearly the opposite of what Professor Jaffe assumes them to be. *He cites no case in which the Supreme Court has entertained an action brought to vindicate the public interest by a citizen having no legal interest of his own.* The Supreme Court has often, in a series of unanimous decisions, dismissed such actions, usually on the theory of lack of case or controversy under Article III of the Constitution.

At page 66 Professor Davis concludes:

> *Conclusion concerning Jaffe proposals.* What the federal law of standing most needs is not a revolutionary rejection of the unbroken tradition and practice that a plaintiff to have standing must assert an interest of his own, whether or not a public interest is involved. What is most needed is a consistent instead of an uneven judicial practice of opening the judicial doors to a plaintiff who does have an interest of his own which is in fact adversely affected. The sound view was stated by the House and Senate Committees with respect to § 10(a) of the Administrative Procedure Act, that any person has standing who is "adversely affected in fact." The sound view was stated by the Supreme Court in its 1963 opinion in the Bantam Books case when it allowed standing because the plaintiffs "have in fact suffered a palpable injury."

D. The Decision in *Frothingham* v. *Mellon* Was Not Based on the Proposition That the Asserted Violation of a Constitutional Right Was Too Small To Be Redressed

Appellants also seek to avoid the decision in *Frothingham* v. *Mellon* by stating that the foundation of the

decision is a determination that "the injury to the plaintiff is 'minute' and therefore is subject to the adage *de minimis non curat lex*" (appellants' brief, page 12). The decision in *Frothingham* v. *Mellon* nowhere refers to any injury as "minute", and there is nothing in the decision which can be taken to say that there are violations of Constitutional rights too small to merit redress in the federal courts. Rather it was the nature of a taxpayer's interest in the general funds of the federal treasury that this Court found to be "minute and indeterminable." 262 U. S. at 487. It was because a federal taxpayer was not directly affected and not because the wrong charged was in any sense small that the Court lacked jurisdiction. That appellants' contentions are erroneous in this respect is shown by the opinion of this Court in *Abington School District* v. *Schempp,* 374 U. S. 203 (1963), holding that it was no defense that the religious practices complained of were minor encroachments but, as stated at page 224, "It goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain."

The Court stated in *Doremus* v. *Board of Education,* 342 U. S. 449 (1952), that if a plaintiff shows the requisite financial interest to bring a taxpayer's suit, which a local taxpayer has with respect to local expenditures, it would not matter that his motive is a religious difference and not a monetary one. In the instant case appellants candidly state, at page 37 of their brief, that "they are not motivated by any desire to keep taxes down." Appellants claim they sue to prevent a pocketbook injury in order to raise their

First Amendment claim, but their allegations fail to set forth any financial interest in the general funds of the federal treasury which differs from the interest of any federal taxpayer in any expenditure.

There is no factual allegation to show that a decision in the case will have any financial effect on the appellants. Although it is contended that defendants' actions constitute the levying of a tax for religious purposes, there is no particular tax levied to support the programs under the Act, and the only federal tax which appellants allege they pay is the federal income tax. The funds which pay for the challenged programs are disbursed from the general funds of the federal treasury raised by various taxes, as well as by bonds and other means. There is no allegation that appellants' taxes are increased by reason of the expenditures of which they complain or that their taxes would be diminished if some programs were not conducted on the premises of nonpublic schools.

Appellants' only complaint is that funds of the federal treasury are being disbursed for an impermissible purpose, and the nature of appellants' interest in the federal treasury is no different from the interest which was the basis of the complaint in the *Frothingham* case. This Court did not hold that if the Maternity Act was unconstitutional, it was only a minor contravention of the Bill of Rights. It held that the nature of the relationship of any taxpayer to the general funds of the federal treasury is too tenuous to form the basis of a claim that the taxpayer is legally harmed, in any degree, by reason of a disbursement of the treasury's funds.

There is no anomaly in the fact that a local taxpayer has a more direct relation to local governmental expenditures than a federal taxpayer has to national expenditures. The establishment clause is not thereby made a dead letter as far as the Congress is concerned, for any act of Congress may be reviewed in any case in which a party is directly affected.

II

There is no Basis for Appellants' Contention That the Act Must go Unchallenged Unless Federal Taxpayers Have Standing to Sue.

It is contended on appellants' behalf that the Act should not be immune from judicial review, and of course it is not. For example, Title I and Title II contain sections providing for judicial review in a United States Court of Appeals where any State is dissatisfied with the final action of the Commissioner of Education with respect to the approval of the State's application or where the Commissioner withholds funds or notifies a state it is ineligible to participate for failure to comply with the provisions of the Act. Title I, § 211; Title II, § 207.

Moreover, there is a case now before the Court, *Board of Education of Central School District No. 1* v. *Allen, No. 660,* in which probable jurisdiction has been noted, where suit was commenced by a local public school board to challenge the validity under the federal and New York Constitutions of a statute providing textbooks to children enrolled in nonpublic as well as public schools. Although that case

has not yet been decided, it is axiomatic that issues of federal Constitutional law may be raised in this Court only by persons having standing to sue. The appellant in that case is a public school board, and, if it is decided that it may raise in this Court the question whether the state statute involved in that case contravenes the establishment clause of the federal Constitution, it would appear that any of the local school boards which are local educational agencies under the Act would have a far better claim to standing to challenge the Act than federal taxpayers have.

Furthermore, it goes without saying that in addition, any persons who are directly affected may maintain a suit to protect their rights and procure a decision of a constitutional question if such a decision is necessary to the adjudication of their rights. This is not a statute where there is no one who can be directly affected by its administration. For example, the children of the *amici curiae* submitting this brief are very directly affected by the administration of the Act. They would be vitally affected by a school board's decision that, notwithstanding the determination by their local school board that speech therapy, remedial reading, remedial arithmetic, and guidance counselling should, in order to be educationally effective, be given on the premises of the school the children regularly attend, it will not be given there because the schools have some religious affiliation. Such a decision would mean that these children must either give up their enrollment in religiously affiliated schools in order to receive help as educationally valuable as that given other children or take part in the public welfare pro-

gram by receiving only educational aid that the public school authorities have decided is educationally inferior to the aid which children attending public and private schools without religious affiliations are eligible to receive.

For any of these reasons, it is not necessary to reconsider the decision in *Frothingham* v. *Mellon* in order to assure that it is possible to have judicial review of the statute which is the subject of this suit.

III

Standing to Challenge Acts of Congress Should not be Allowed to Members of the General Public Where it is Predicated Solely on the Assertion That National Welfare Legislation Aiding the General Public Without Regard to any of its Members' Religious Beliefs and Associations Will Impermissibly Benefit Religious Institutions by Including Within its Class of Beneficiaries Persons Having Religious Affiliations or Associations.

The only relation between the Act and any religious institution is that some members of the general public who are benefited are regularly enrolled in schools having a religious affiliation so that when a public school board decides to conduct certain programs in the children's normal school environment some children receive the help on the premises of such schools; there is no benefit to any religious institution except in so far as its members are benefited as members of the general public. Appellants do not contend that educational help under Title I and Title II may not be given to children who regularly attend religiously affiliated schools. Appellants do not dispute that the only aid which may be given under the Act is additional aid in the form of educational services and materials which add to what is regularly provided by the local public

and nonpublic schools and which contribute particularly to meeting the special needs of educationally deprived children. Nor do appellants dispute that funds disbursed under the Act are, as the Act requires, paid only to public school boards, which control and administer every aspect of every program and decide where any particular program is to be given, and that no funds are given to any religiously affiliated school, educator, pupil, or parent or are used for religious worship or instruction. Their only complaint is that the programs under the Act, which are undisputedly programs drawn up and administered by public school officials who establish and administer programs for all children in areas having concentrations of low-income families, are conducted in certain instances on the premises of the schools in which the children are regularly enrolled, which include religiously affiliated schools, and that some of the Title II materials are used on such premises.

The *amicus* brief of Protestants and Other Americans United for Separation of Church and State is simply factually incorrect in stating at page 13 that there are programs under the Act which are not under public control and that "the federal government . . . is pouring its money into church institutions." The same brief is also factually incorrect at the same page in its outrageous suggestion that sending children to religiously affiliated schools is motivated by a "desire to escape racial integration." The religiously affiliated schools to which the parents submitting this brief send their children are open to and attended by children of all races and ethnic groups, and the parents submitting this brief include members of minority groups, including Negroes and Puerto Ricans.

The Act benefits children regularly enrolled in schools having a religous affiliation only as they are members of the general public and not as members of any religious faith. Certain remedial programs are given by the Board of Education of the City of New York on the premises of religiously affiliated schools because the Board considers that those programs should be conducted there, not for any reason related to the religious association of the school, but because it is the regular educational environment of the child who needs the particular remedial help in that environment. In the instant case there is no benefit to any religious institution unless it may be claimed that aiding persons who are associated with a religious institution as members of the general public in exactly the same way that other members of the general public are aided benefits a religious institution.

Thus in asking for an exception to the rule of *Frothingham* v. *Mellon* in this case, appellants seek to establish a doctrine that, although members of the general public may not as a rule maintain lawsuits challenging the constitutionality of acts of Congress, there should be one exception under which anyone may point to the religious affiliation of any other member of society and ask the courts to determine whether that religious affiliation should bar his fellow citizen from receiving benefits Congress has made available to all.

This is one reason why standing in this case is not like standing to challenge an act of Congress authorizing the construction of a cathedral, which the dissent-

ing judge below found indistinguishable. In the case of legislation authorizing the construction of a house of worship, a religious institution is benefited directly and separately from society at large, and not merely by reason of its members participating in national welfare programs under which benefits are available to all without reference to any religious affiliation. In challenging legislation authorizing the construction of such a building, it is not necessary for the plaintiff to assert the difference between some persons and others because of the religious association of some recipients of the governmental expenditure; the preferential support of religion is inherent in the legislation itself. In the instant case, however, there is nothing in the Act which benefits anyone except disadvantaged children. It is not possible to claim that religious institutions are supported by the Act without pointing to some of the children who are eligible to receive aid under it and stating that they have some religious association. It is not the statute that deals with any person as a member of any religious group; it is the persons bringing the suit who distinguish among recipients of the federal aid by reason of their religious associations. We submit that the First Amendment does not require that taxpayers be given standing to sue in such a case. On the contrary, we submit that the First Amendment protects the right of individuals to be free from the effect of lawsuits which could be commenced by anyone and which are based on their religious association and seek for that reason to place them in a different category from all other persons where the act of Congress under attack has not done so.

The safeguards of the religious freedom clauses of the First Amendment are not served by allowing some citizens to categorize other citizens as followers of religious practices or members of religious associations and to assert in the courts that by reason of that categorization they are ineligible to receive general public welfare benefits; on the contrary, such a claim should be the last case, rather than the first, in which a taxpayer is allowed to sue.

IV

If Standing to Sue is Allowed Without Consideration of the Nature of the Asserted Constitutional Violation and the Relation of the Plaintiff to it, Constitutional Questions Presented to the Court Will be Framed to Further Leglislative Objectives Rather Than to Protect Legal Rights.

To date, cases involving standing to challenge a statute under the religious freedom clauses of the First Amendment have involved a consideration of the nature of the asserted Constitutional violation and the relation of the plaintiff to the asserted violation and, unless a proper showing is made, the statute may not be challenged.

For example, it has been settled by this Court that those who would assert a claim under the free-exercise clause must show that they have religious beliefs and how those religious beliefs have been infringed. *Abington School District* v. *Schempp,* 374 U. S. 203, 224 n. 9 (1963); *McGowan* v. *Maryland,* 366 U. S. 420 (1961).

In *McGowan* v. *Maryland, supra,* certain department store employees who had been convicted of violating a state Sunday-closing law attempted to challenge the constitutionality of the statute under the First Amendment, both as an infringement of the free exercise of religion and as an establishment of religion. Although it was beyond question that the employees were directly affected by the statute, this Court held that they had no standing to challenge the statute under the free exercise clause, stating at pages 429-430:

> But appellants allege only economic injury to themselves; they do not allege any infringement of their own religious freedoms due to Sunday closing. In fact, the record is silent as to what appellants' religious beliefs are. Since the general rule is that "a litigant may only assert his own constitutional rights or immunities," *United States* v. *Raines,* 362 U. S. 17, 22, we hold that appellants have no standing to raise this contention. *Tileston* v. *Ullman,* 318 U. S. 44, 46. Furthermore, since appellants do not specifically allege that the statutes infringe upon the religious beliefs of the department store's present or prospective patrons, we have no occasion here to consider the standing question of *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535-536. Those persons whose religious rights are allegedly impaired by the statutes are not without effective ways to assert these rights. Cf. *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 459-460; *Barrows* v. *Jackson,* 346 U. S. 249, 257. Appellants present no weighty countervailing policies here to cause an exception to our general principles. See *United States* v. *Raines, supra.* [Footnote omitted].

In the instant case, the complaint sets forth no allegations whatever with respect to appellants' religious beliefs and how those beliefs are infringed or how appellants are embarrassed or inhibited in the exercise or nonexercise of religion by a public school board's use of the physical facilities of religiously affiliated schools, as well as public schools, to carry out public programs of special educational help. Thus there is no showing of standing with respect to their free exercise clause claim.

Moreover, although this Court has stated that it is not necessary to allege how one's particular religious freedoms are infringed to have standing under the establishment clause, it has never suggested that it will allow a suit to be maintained without regard to the nature of the alleged infringement of the Constitution and how it affects the plaintiff. On the contrary, in *Abington School District* v. *Schempp, supra,* parents of children, who were directly affected by the recitation in their public schools of religious scriptures, had standing to assert a claim under the establishment clause, while in *Doremus* v. *Board of Education, supra,* state and municipal taxpayers showing no measurable disbursement of state or local funds had no standing to raise the same claim.

Here, appellants have not even set forth a colorable claim of establishment. It has been settled by this Court that the benefits of public welfare statutes may not be denied to some persons because of their religious beliefs or practices. *Sherbert* v. *Verner,* 374 U. S. 398 (1963); *Everson* v. *Board of Education,* 330

U. S. 1, 16 (1947). See, *Cochran* v. *Louisiana Board of Education*, 281 U. S. 370 (1930). There is not the slightest suggestion in the complaint how the conducting of educational programs by public school authorities in certain instances on the premises of religiously affiliated schools is claimed to be an impermissible establishment of religion, while conducting the same educational services for children regularly enrolled in religiously affiliated schools at a different location is not.

If challenges are to be allowed at the instance of those who are in no way affected by the practice of which they complain, the Constitutional questions presented to this Court will be tailored to further the objectives and views of particular groups who will not be limited in the relief they seek by the effect upon them of the asserted violations. For example, as we have shown above, the only aspect of the Act challenged by appellants is the use of the premises of religiously affiliated schools as the location at which some programs under the Act are carried out. Appellants do not object to giving aid under the Act to children who are regularly enrolled in religiously affiliated schools as long as the help is given on public premises or on private premises not having any connection with a religious institution. Appellants also allege in their complaint that they do not consider that services such as medical and dental care should be forbidden on the premises of religiously affiliated schools.

Under the rule of standing sought by appellants any other group having certain ideas of what portions

of the Congress' welfare legislation should be carried out will be equally free to pose, as a question of Constitutional law to this Court, their own legislative ideas of which members of our society should be excluded from receiving such benefits. Each statute will pose as many Constitutional questions as there are organized groups interested in amending the legislation in the courts, and the relief sought in those lawsuits will have no relation to any injury to anyone.

CONCLUSION

For the reasons set forth above the decision of the three-judge court should be affirmed or, in the alternative, the appeal should be dismissed.

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Respectfully submitted,

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